TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 217.

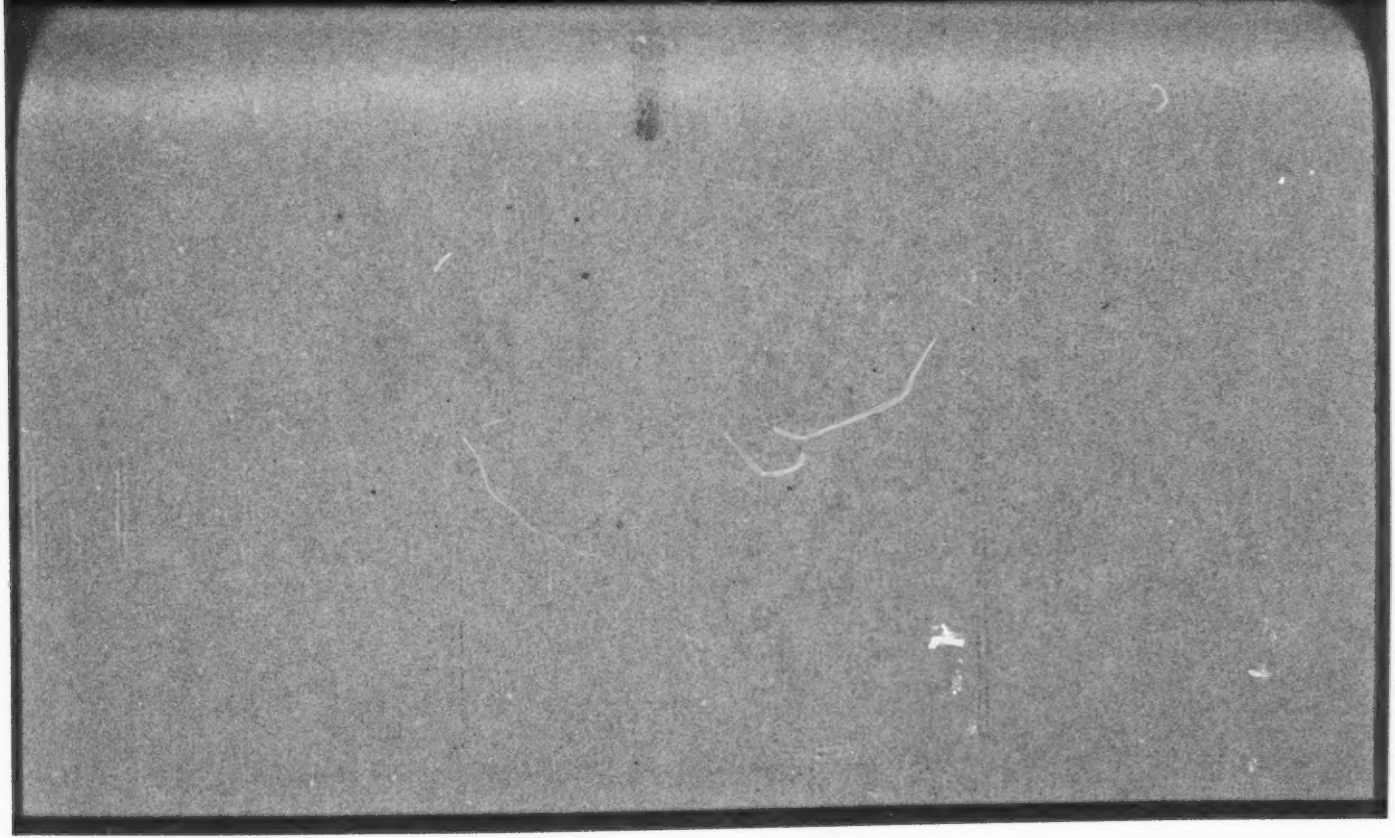
THE UNITED STATES, APPELLANT,

vs.

CHARLES J. FERRIS.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 12, 1923.



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1 In the Court of Claims.

CHARLES J. FERRIS
v.
THE UNITED STATES. } No. 315–A

I. *Petition.*

(Filed November 10, 1921.)

To the Honorable the Court of Claims:

The claimant, Charles J. Ferris, respectfully represents:

I. The claimant was during the time hereinafter set forth a lieutenant colonel in the Army of the United States.

II. On August 27, 1917, he was an officer of the 314th Field Artillery, being lieutenant colonel thereof. On that day, he was by verbal orders of the commanding general, 80th Division, comprising the 314th and 315th Regiments of Field Artillery, placed in command of the 315th Regiment of Field Artillery, there being no colonel or lieutenant colonel with that regiment at the time, and that not being his own regiment. He could not have commanded said 315th Regiment of Field Artillery or served with it at all if he had not been placed in command of it by order of the commanding general of the division.

He immediately took command of said 315th Regiment of Field Artillery on August 27, 1917, and remained in command thereof until January 5, 1918, during all that time, with the exception
2 of one day, September 24, 1917, exercising the command of a colonel commanding said regiment, under orders issued by competent authority.

III. During the whole of the period in question said 315th Field Artillery was assembled for the purpose of carrying on and bringing to a conclusion the war then existing with Germany and afterwards with Austria-Hungary and was operating against enemies of the United States.

IV. During the period during which the claimant was thus in command of the 315th Field Artillery another officer, Lieutenant Colonel Russell P. Reeder, was assigned in that regiment and reported on September 24, 1917, but without actually taking command except nominally for that one day. He was on September 25th placed on detached duty for a three-months' course in the officers' school at Fort Sill, and the claimant by renewed order of the commanding general of the 80th Division was directed to take command of the 315th Field Artillery and remained in command thereof until the return of Lieutenant Colonel Russell P. Reeder to the regiment on January 5, 1918. Upon that date claimant was relieved from duty with the 315th Regiment of Field Artillery and was directed to rejoin his own regiment, the 314th Field Artillery.

During that period in November, 1917, he requested a transfer from the 314th to the 315th Field Artillery, which request was disapproved.

V. This claim is made under the act of April 26, 1898 (30 Stat. 365), providing "that in time of war every officer serving with troops operating against an enemy, who shall exercise, under an
3 assignment in orders issued by competent authority, a command above that pertaining to his grade shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.

VI. The claimant therefore claims the difference between the pay of a lieutenant colonel and that of a colonel from August 27, 1917, to January 5, 1918, amounting to $250 more or less, subject to more exact computation by the General Accounting Office.

VII. This claim was presented to the War Department and an opinion given by the Judge Advocate General, dated June 16, 1921, in favor thereof, which opinion was on June 21, 1921, approved by the Secretary of War. The claim was also presented to the General Accounting Office but was disallowed by the Comptroller General of the United States.

No other action has been had on said claim in Congress, or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims two hundred and fifty dollars ($250.00).

KING & KING,
Attorneys for Claimant.

4 DISTRICT OF COLUMBIA, *ss:*

Charles J. Ferris being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information and belief.

CHARLES J. FERRIS.

Subscribed and sworn to before me this 8th day of November, 1921.

[SEAL.] GEO. B. RANDOLPH,
Notary Public.

5 II. *General traverse.*

(Filed January 10, 1922.)

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. *Argument and submission of case.*

On October 24, 1922, this case was argued and submitted on merits by Mr. George A. King, for the plaintiff, and by Mr. John G. Ewing, for the defendant.

6 IV. *Findings of fact, conclusion of law, and memorandum.*

(Entered Nov. 6, 1922.)

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of fact.

I.

The plaintiff, Charles J. Ferris, was appointed lieutenant colonel, Field Artillery, National Army, in the service of the United States, August 5, 1917; accepted this appointment August 21, 1917, and was attached to and joined the 315th Regiment, Field Artillery, August 23, 1917.

While attached to that regiment he was, August 27, 1917, by special orders issued by the commanding general of the 80th Division, American Expeditionary Forces, placed in command of the 315th Field Artillery, there being no colonel or lieutenant colonel with that regiment at the time. He immediately assumed command of said 315th Regiment of Field Artillery on the date of said order, August 27, 1917, and remained in command thereof by orders of the commanding general until the return of the lieutenant colonel of said 315th Regiment to duty with his regiment January 5, 1918.

During that period he requested to be transferred to said 315th Field Artillery as lieutenant colonel thereof and his request was refused on the ground that there was no vacancy, there being already a lieutenant colonel of said 315th Field Artillery, who was absent on detached duty and who protested against being detached from said 315th Regiment.

The order placing him in command of the 315th F. A. was necessary to enable him to assume such command. The 80th Division was one of the several National Army divisions organized for the purpose of carrying on and bringing to a close the World War and was composed of the different organizations and branches of the service going to make up a combat division, the 314th and 315th Regiments F. A. being component parts thereof. This division was organized and trained at Camp Lee, Virginia, and later on became a part of the American Expeditionary Forces and engaged in action with the enemy.

During the period from August 22, 1917, to January 5, 1918, the 315th Field Artillery was stationed at Camp Lee, Petersburg, Va., and this camp was used as a camp of instruction.

7 II.

During all the time that said Lieutenant Colonel Ferris exercised the command of the 315th Regiment of Field Artillery he was a lieutenant colonel of more than fifteen years' service in the Army and was paid as such.

If paid as a colonel for that period he would be entitled to receive over and above the pay he has already received the sum of $179.17.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one hundred and seventy-nine dollars and seventeen cents ($179.17).

Memorandum.

This is a suit brought by the plaintiff to recover increased pay and allowances for exercising a command above that pertaining to his grade from August 27, 1917, to January 5, 1918.

He relies upon the act of Congress approved April 26, 1898, 30 Stat., 365, which reads as follows:

"That in time of war every officer serving with troops operating against an enemy, who shall exercise, under an assignment in orders issued by competent authority, a command above that pertaining to his grade shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

The plaintiff was a lieutenant colonel of the 314th Field Artillery, and was by orders issued by competent authority under assignment to command the 315th Field Artillery, and exercised said command from August 27, 1917, to January 5, 1918. These two regiments of Field Artillery were in the 80th Division of the National Army organized for the purpose of carrying on the war which was then being waged between the United States and Germany. These regiments were organized and trained at Camp Lee, Virginia, and it was while they were being so organized and trained that the plaintiff rendered the service and exercised the command for which he is now claiming increased pay and allowances.

The troops which were being organized and trained at Camp Lee were assembled there for war purposes, and were necessarily operating against the enemy. They were there for no other purpose. Therefore the service rendered by the plaintiff was with troops operating against the enemy within the meaning of the statute. As was said in 22 Ops. Atty. Gen. 95—

"Any troops assembled at camps in the United States for * * * war purposes can properly be considered as operating against an enemy, although their * * * service is confined to the ordinary routine of camp life."

The plaintiff is entitled to recover, and it is so ordered.

8

V. *Judgment of the Court.*

At a court of Claims held in the city of washington on the sixth day of November, A. D. 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of one hundred and seventy-nine dollars and seventeen cents ($179.17).

By the Court.

VI. *Defendant's application for appeal.*

(Filed Dec. 26, 1922.)

From the judgment rendered in the above-entitled cause on the 6th day of November, 1922, in favor of claimant, the defendants, by their Attorney General, on the 23rd day of December, 1922, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

J. G. E.

VI. *Allowance of appeal.*

Order.

It is ordered by the Court that the defendant's application for appeal in this cause be and the same is allowed.
January 15, 1923.

9

Court of Claims.

[Title omitted.]

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and memorandum entered by the court; of the judgment of the court; of the defendant's application for appeal; of the order of court allowing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City, this sixth day of February, A. D. 1923.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

(Indorsement on cover:) File No. 29,395, Court of Claims. Term No. 217. The United States, Appellant, vs. Charles J. Ferris. Filed February 12th, 1923. File No. 29,395.

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Office Supreme Court, U. S.
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WM. R. STANSBURY
Clerk

No. 217.

In the Supreme Court of the United States.

OCTOBER TERM, 1928.

UNITED STATES OF AMERICA, APPELLANT,

v.

CHARLES J. FERRIS.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1929

In the Supreme Court of the United States.

OCTOBER TERM 1923.

UNITED STATES OF AMERICA, APPELLANT,
v.
CHARLES J. FERRIS. } No. 217.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The respondent was a Lieutenant Colonel in the National Army, attached to the 314th Regiment, Field Artillery.

On August 27, 1917, by special orders issued by the Commanding General of the 80th Division, he was placed in command of the 315th Field Artillery, there being no Colonel or Lieutenant Colonel with that regiment at that time. He immediately assumed command of that regiment, and remained in command thereof until the return to duty of the Lieutenant Colonel of said regiment on January 5, 1918.

NOTE.—The finding of the Court of Claims is that he was attached to the *315th* Regiment as Lieutenant Colonel, but this makes the findings unintelligible.

The petition alleges in paragraph two that he was Lieutenant Colonel of the *314th* Field Artillery, and was transferred from the regiment to the 315th Regiment, of which he was given command. Such was undoubtedly the fact, and there is evidently an error in the printing of the first paragraph of the findings of the Court of Claims. (See also the opinion of the Comptroller General, 1 Dec. Comp. Gen. 37.)

The 314th and the 315th Regiments of Field Artillery formed part of the 80th Division, one of the divisions organized for the purpose of carrying on the late war. The division was organized and trained at Camp Lee, Virginia, and later on became a part of the American Expeditionary Forces. During the period from August 27, 1917, to January 5, 1918, the period for which Colonel Ferris has been held entitled to the increased pay, the regiment was stationed at Camp Lee, Petersburg, Virginia, and the Camp was used as a camp of instruction.

The only point in the case is whether during the time of his command of the 315th Regiment he was entitled to the pay and allowances of a Colonel pursuant to the provision of Sec. 7 of the Act of April 26, 1898, c. 191, 30 Stat. 365, as follows:

> That in time of war every officer serving with troops operating against an enemy, who shall exercise, under an assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of

the grade appropriate to the command so exercised.

The Act is entitled "An Act for the better organization of the line of the Army of the United States."

The Court of Claims held in his favor. The contention of the Government is that he was not "serving with troops operating against an enemy."

ARGUMENT.

The question presented is a very simple one of statutory construction. The obvious purpose of the Act was to give to certain officers in time of war, under certain circumstances, an increase of pay over that ordinarily pertaining to their rank. To entitle them to this pay they must, in addition to the other conditions, be "serving with troops operating against an enemy."

The case presents the question of the meaning of the words "serving with troops operating against an enemy." The Court of Claims has held that troops in course of training and instruction in one of the great training camps were operating against an enemy. This conclusion seems to us to be unsound. The statute clearly recognizes the fact that, in time of war, there are troops operating against the enemy, and troops *not* operating against the enemy, and draws a distinction between them. If these words in the statute had been left out and the statute had merely provided that in time of war every officer serving with troops and exercising a command above that pertaining to his grade should have the additional

pay, Colonel Ferris would, of course, be entitled to it, but it seems to us that the decision of the Court of Claims has failed to draw the distinction which the words in the statute plainly imply. During this period the troops with which Colonel Ferris served were under instructions and training, fitting themselves for military service at a camp 3,000 miles away from any fighting or any operations of the kind commonly understood to be operations against an enemy. As a matter of common knowledge of which the court can take judicial notice, there were no military operations in the ordinary sense of the word carried on within the limits of the United States. The troops operating against the enemy were those overseas. It would never occur to anyone, we submit, in ordinary conversation or in writing or speaking of the war, to refer to the drafted men in the cantonments in this country, engaged in training to go overseas, as operating against an enemy. They were being fitted, drilled, and trained so that they might engage in such operations, and this particular regiment ultimately went overseas, where it undoubtedly engaged in such operations.

The *Century Dictionary and Encyclopedia*, volume 6, page 4121, gives the following definition:

> Operation: * * * 3. The course of action or series of acts by which some result is accomplished; process. * * * (*c*) In *War* the act of carrying out preconcerted measures by regular movements; as military or naval *operations*.

A most exhaustive dictionary, entitled "A New English Dictionary," edited by Doctor Murray, 1909, volume 7, p. 144, contains the following definitions:

> Operate (military and naval). To carry on warlike operations; see operations, 7.
>
> Operation 7 (military and naval). A series of warlike or strategic acts; a movement.

Wilhelm's Military Dictionary and Gazeteer, 1881 (p. 368):

> Operations, Military. Consist in the resolute application of preconcerted measures in secrecy, dispatch, regular movements, occasional encampments, and desultory combats or pitched battles.

Same authority, on page 341:

> Movements. A term used to express the changes of position which troops undergo in performing their evolutions.

The *Standard Dictionary* gives this definition:

> Operations. A course or series of acts to effect a certain purpose * * * as military *operations*.

In Farrow's Military Encyclopedia, by Edward S. Farrow, United States Army, late Assistant Instructor of Tactics in the United States Military Academy at West Point (1885), the following definition of operations is given:

> Operations.—Under the term Military Operations are included: Field operations; offensive and defensive operations; underground operations; siege operations, etc. All consist in the

> resolute application of preconcerted measures in secrecy, dispatch, regular movements, occasional encampments, and desultory combats or pitched battles.

From these definitions it is evident that the term "operating against an enemy," used in the statute, is not employed in common usage or by military practice to describe what goes on when bodies of men fresh from civil life are assembled in camps thousands of miles from the scene of active hostilities, to be made into soldiers; to be fitted for military duties under instruction, drilling, and training. They are clearly not engaged in operating against an enemy, within the meaning of the words as ordinarily used. Camp Lee was not a camp for defensive or offensive operations. It was a school for instruction, just as is West Point or Annapolis.

The Court of Claims bases its decision largely upon an opinion of the Attorney General, 22 Ops. A. G. 95, in which he held that troops assembled in camps in the United States during the Spanish War for war purposes could properly be considered as operating against an enemy under the statute. It is respectfully submitted that the reasoning of this opinion is not sound, and that to apply it to the present case is to fail to give any effect whatever to the words of the statute "serving with troops operating against an enemy." There is, of course, no desire or intention to disparage in the slightest degree the services rendered by officers in the training camps in this country, nor of the other officers who are not included

within the terms of the statute, for it is obvious that many discharging highly important and meritorious services are not included.

Many officers serving with troops in actual combat with the enemy are not included within the provisions of the Act. The title of the Act indicates that it applies only to "line" officers. To enjoy its benefits, an officer must "exercise a command"—that is, he must be a line officer. Staff officers do not exercise a command, and so are not included. *Truitt* v. *United States*, 38 Ct. Cl. 398. Thus the benefits are denied to a great number of officers performing highly important duties, bearing great responsibilities, which involve in many instances the gravest danger of injury and death.

The Opinion of the Attorney General (22 Ops. A. G. p. 95) concedes that, at the time it was rendered, all service in the Army was not to be considered as operation against an enemy, as, for example, the troops and their officers on the western frontiers performing garrison service. The Opinion quotes the following from a letter of the Paymaster General, which was the basis of the request of the Secretary of War for the Opinion:

> As yet, although war has been declared to exist between Spain and the United States, there are, in my opinion, with the exception of the troops embarked for the Philippine Islands, no troops "operating against an enemy."
>
> There is, within our borders, no enemy, within the meaning of the law, for troops to

> to operate against. An army has been called together, and is being drilled, disciplined, and prepared to operate against an enemy, but until that army embarks for a foreign country, or until an enemy appears on our shores, and the army confronts it, it is held that no officer can receive the pay of a higher grade by virtue of anything in the act referred to.

This it seems to us is more logical than the opinion of the Attorney General disapproving it.

In *United States* v. *Mitchell*, 205 U. S. 161, it was held that when an officer was assigned to a higher command by his corps commander, he could not, under this statute, recover the pay of the higher grade, when such command devolved upon him by seniority without the aid of the order assigning him thereto. In the Court of Claims it was urged that this principle prevented recovery by Colonel Ferris.

The Opinion of the Comptroller General (1 Decisions Comp. Gen., p. 37) rejecting the claim of Colonel Ferris, states that it is unnecessary to decide "whether he was operating against an enemy" within the meaning of the statute, because, he held, he would have commanded by virtue of seniority in accordance with the Army Regulations had no orders to take command been issued, citing *United States* v. *Mitchell*, 205 U. S. 161. This latter point, however, seems to be foreclosed by the finding of the Court of Claims that the order placing Colonel Ferris in command of the 315th Regiment was necessary to enable him to assume such command.

Though the amount involved in this particular case is trifling, the decision will control many others involving an aggregate amount so large that it is deemed proper by the Government to have it passed upon by this Court.

It is respectfully contended, therefore, for the reason stated, that the judgment of the Court of Claims should be reversed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

MARCH, 1924.

○

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Supreme Court of the United States.

October Term, 1923.

UNITED STATES OF AMERICA, *Appellant*,
v.
CHARLES J. FERRIS, *Appellee*. } No. 217.

BRIEF OF AMICUS CURIAE.

MORRISON SHAFROTH,
Amicus Curiae.

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Supreme Court of the United States

October Term, 1923.

UNITED STATES OF AMERICA, *Appellant*,
v.
CHARLES J. FERRIS. } No. 217.

BRIEF OF AMICUS CURIAE.

POINTS AND AUTHORITIES.

I.

In order to entitle claimant to additional pay, the order under which he exercises the higher command must be indispensable to the exercise of the command:

United States v. *Mitchell*, 205 U. S. 161.
Walker v. *United States*, 43 C. Cls. 1.
Humphreys v. *United States*, 38 C. Cls. 689.

II.

Operations against the enemy can not be restricted to the immediate battlefield. In a great war all military activities of troops from mobilization to fighting are a part of the necessary military operations against the enemy. This is the settled construction of international law.

United States v. *Mitchell*, 205 U. S. 161.
General Orders No. 86, U. S. Army, July 2, 1898.
Walker v. *United States*, 43 C. Cls. 1.
22 Opns. Atty Gen. 95 and 96.
Pierce v. *United States*, 252 U. S. 239.
Article 44 of the Hague Regulations of 1899.

Proceedings of the Hague Peace Conference, 1917, prepared under the direction of James Brown Scott and published by the Oxford University press in 1922, page 118.

International Law, chiefly as interpreted and applied by the United States, by Charles Cheney Hyde, page 384, Sec. 699, Vol. 2.

BRIEF OF THE ARGUMENT.

STATEMENT.

The claim of appellee arises under Section Seven of the act of April 26, 1898 (30 Statutes, 364, 365, C. 191), reading as follows:

> "That in time of war, every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

The attempt of the Government to so limit the interpretation of the term "troops operating against an enemy" to apply only to troops while they are actually being fired upon, or are actually pursuing the enemy, is so novel and so contrary to the theory upon which our armies were mobilized and the war waged to a successful conclusion that this case is of peculiar interest to all service men.

I.

AN ORDER MUST BE NECESSARY TO ENABLE THE COMMAND TO BE EXERCISED.

The law is well established that an officer in order to be entitled to the pay of the higher grade must not only exercise the command under orders, but the orders

must have been actually necessary in order to enable him to exercise the command. In other words, the command must not be such that without any orders at all he would succeed to the command by reason of the mere fact that he was the senior officer, properly assigned to and left in command of the unit. Such a case is one where, in the absence of his captain, the first lieutenant, serving with and assigned to the company, succeeds by seniority and without orders to the command of the company.

United States v. *Mitchell*, 205 U. S. 161.
Walker v. *United States*, 43 C. Cls. 1.
Humphreys v. *United States*, 38 C. Cls. 689.

In this case the Court of Claims has found since appellee was not assigned to the 315th Regiment, Field Artillery, but was merely attached, that he could not succeed to the command of that regiment without an assignment in orders issued by competent authority. Assuming this to be the case, the sole remaining question is whether or not these troops which were being organized and training at Camp Lee, Virginia, during the period in question, were "troops operating against an enemy" within the meaning of the statutes.

II.

OPERATIONS AGAINST THE ENEMY CAN NOT BE RESTRICTED TO THE IMMEDIATE BATTLEFIELD. IN A GREAT WAR ALL MILITARY ACTIVITY OF TROOPS, FROM MOBILIZATION TO FIGHTING ARE A PART OF THE NECESSARY MILITARY OPERATIONS AGAINST THE ENEMY. THIS IS THE SETTLED CONSTRUCTION OF INTERNATIONAL LAW.

It would seem that the construction of the term "troops operating against an enemy" has been long since conclusively settled. The act in question was passed during the Spanish-American War, and almost immediately after the passage of the act the Attorney General gave an opinion which was promulgated to the Army in General Orders No. 86 as follows:

> "HEADQUARTERS OF THE ARMY,
> "Adjutant General's Office,
> "Washington, July 2, 1898.
>
> "1. In paragraph seven of the Act 'For the Better Organization of the Line of the Army of the United States,' approved April 26, 1898 (30 Stat. at L. 365, Chap. 191, U. S. Comp. Stat. 1901, p. 895), it is provided 'That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.'
>
> "The Attorney General has held that this clause 'was intended to apply to all instances where the troops of the United States are assembled in separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain.' But that 'all service in the Army at the present is not to be considered as operating against an enemy.' Troops and their officers on the western frontiers, performing the same service as garrisons which is requisite in time of peace, and in no wise considered a part of the Army assembled to carry on the war with Spain, would not be within the meaning of the Act."

This interpretation, as far as I have been able to find, has never since been disputed by any court, nor questioned in any decision. Under this interpretation,

claims by the score have been paid. With this interpretation undisputed, practically all of the cases decided on this question have gone to judgment. In the case of the *United States* v. *Mitchell*, 205 U. S. 161, the point is not even mentioned, though the service in that case was with troops within the United States and not in Cuba. The same thing is true in the case of *Walker*, 43 C. Cls. 1. The opinion of the Attorney General, 22 Opins. 95, 96, lays down the broad principle that the true test of whether troops fall within the meaning of the term "operating against an enemy" is whether or not they have been assembled for carrying on the general purposes of the war. He used this language:

> "I think also that, while assembled at camps in the United States, such as I have named, any troops of the army assembled for the present war purposes, can properly be considered as operating against an enemy, although their present service is confined to the ordinary routine of camp life, drill, discipline, and other preparation. The assembling of such troops, their drill, discipline and equipment, while assembled in the military bodies, are all a part of the same general war purposes."

There can be no legitimate distinction between troops which are being mobilized and trained for active service against the enemy and troops which are already thoroughly trained and merely awaiting orders to move on to the firing line. Every division and every soldier in the United States and abroad during the late war, when not actually on the firing line, was in training for combat service. Modern war develops constantly new methods of warfare, and troops, even at the front, are actively engaged in training to meet these developments of war. This is illustrated in General Persh-

ing's report to Secretary Baker made November 20, 1918, where he says:

> "During our period of training in the trenches some of our divisions engaged in local combat * * * ."

The Government in a succeeding case to this, *Lanagan* v. *United States*, claims that the men were engaged in training for combat services during all of the time they were in camp, during the time they were being transported to and across France, and until the very day they came to the front and engaged in actual firing upon the enemy, and that, consequently, not until that day could they be deemed to be taking part in the military operations of our Government against the enemy.

Surely a construction, so unjust, so out of accord with the spirit in which the act of Congress has been interpreted in all the years before; so out of accord with the unity of spirit which must prevail in the conduct of war, which makes every soldier a part of the active military forces of the United States; so out of accord with logic and reason, ought not to be permitted to prevail in this court, unless forced by fixed and certain rules of construction.

It is common knowledge and a matter of history that it was only lack of transportation that prevented the transportation to Europe of all of the army long before they were actually sent. The fact that divisions continued to train up to the time that transportation was ready does not in any way alter the fact that these divisions constituted troops regularly trained, drilled and assembled in camps, and potential units in any combat operations with the enemy. All troops, when not engaged in actively fighting, are in training, receiving instruction. Troops drawn out of the trenches

and taken back for a short period of training, instruction and rest, surely could not be held not to be operating against the enemy, merely because, when they were not actively firing upon and bayoneting their foe, they were receiving instruction in the modern methods of warfare.

In some wars it might be possible that certain troops could be considered as not operating against the enemy. That could not be true of the Great War. If the United States were engaged in a war against Panama or Honduras, which required nothing but a small force of marines to quell it, it would be quite evident that the other troops in the United States were not mobilized for the purpose of fighting the war in Honduras and so could not be said to be participating in any general operations against the enemy. But in a war which required every ounce of strength that the Government could rally, the very first operation against the enemy, undertaken by this Government, was the mobilization of its forces in camps for the purpose of training, equiping and sending them overseas. The next operation was their concentration at port; then their movement to the front. Every one of these things constituted operations against the enemy in the broad sense of that term.

The first military operations in the World War by Russia and Germany were the mobilization of their troops, and practically the first step in the great military operations of the American Government was the mobilization of its drafted men in camps preparatory to sending them overseas.

The term "military operations" or "troops operating against an enemy" can have a liberal or a narrow interpretation. Take the act of June 15, 1917, by which t was made a crime to make false reports or statements,

"With intent to interfere with the operation or success of the military or naval forces of the United States."

The United States Supreme Court, in the case of *Pierce* v. *United States*, 252 U. S. 239, affirms the decision of the lower court, sentencing the defendant under this act for the circulation of pamphlets, which the court held might interfere with the operation or success of the military or naval forces of the United States. Certainly in the narrow sense, no pamphlet, circulated in the United States, could interfere with the troop movements on the front in France. But taken in its broad sense, by interfering with mobilization, enlistment, etc., even the circulation of pamphlets might be with intent to and was held to be with intent to interfere with the military operations of the United States. That this is the ordinary interpretation is shown by the fact that ARTICLE 44 OF THE HAGUE REGULATIONS OF 1899 USED THIS LANGUAGE: "IT IS FORBIDDEN TO FORCE THE POPULATION OF OCCUPIED TERRITORY TO TAKE PART IN MILITARY OPERATIONS AGAINST ITS OWN COUNTRY." This is but a codification of the long standing rule of war, which forbids, for any purpose, the enforced enlistment, in the army of the belligerent, of the inhabitants of the enemy country. Surely no one would contend that under the above article a belligerent could for any purpose force the population of occupied territory into its army, even though the portion of the army into which the inhabitants were enrolled was not to be used directly on the firing line.

In the proceedings of the Hague Peace Conference of 1917, prepared under the direction of James Brown Scott, and published by the Oxford University Press in 1922, in discussing this question of the use of the

inhabitants of an occupied country, Major-General Yermolow, the Russian representative there, used this language at page 118: "To this explanation of my honored colleague, from Austria-Hungary, I request permission to add that in so far as concerns the service of enemy ressortissants in the ranks of the enemy, it is already forbidden by Article 44 of the Convention * * * ."

The prohibition against employing inhabitants, in operations of war against their own country, as meaning that under no circumstances can they be forced into the ranks of the army, whether that army is in training merely or engaged in active fighting, has been the universal construction given to that term in International Law.

It goes even further than that. Charles Cheney Hyde, at page 384, Sec. 699, Vol. 2, of his recent work, "International Law, Chiefly as Interpreted and Applied by the United States," uses this language:

"THE PROHIBITION AGAINST FORCING THE INHABITANTS TO TAKE PART IN THE OPERATIONS OF WAR AGAINST THEIR OWN COUNTRY PRECLUDES, HOWEVER, ACCORDING TO THE RULES OF LAND WARFARE, THE REQUISITIONING OF THEIR SERVICE UPON WORKS DIRECTLY PROMOTING THE ENDS OF WAR, SUCH AS THE CONSTRUCTION OF FORTS, FORTIFICATIONS AND ENTRENCHMENTS."

In other words, International Law has adopted the same interpretation as to the meaning of the term "military operations," as was promulgated in General Order No. 86 on July 21, 1898, and as was adopted by the Attorney General, who in 1898 held that the true

test was whether or not the one general war purpose was being furthered.

Not only the reasonableness of the matter, but the very fact that the opinion of the Attorney General, heretofore stated, has stood unchallenged for more than twenty years, while claim after claim was being paid under that interpretation is clearly indicative of the weakness of the Government's position in this case, and shows that in this case, under any reasonable interpretation, claimant was serving with troops operating against the enemy during the entire period of his claim.

MORRISON SHAFORTH,
Amicus Curiae.

UNITED STATES *v.* FERRIS.

APPEAL FROM THE COURT OF CLAIMS.

No. 217. Argued April 8, 1924.—Decided May 26, 1924.

An army officer was not "serving with troops operating against an enemy," within the meaning of § 7 of the Act of April 26, 1898, c. 191, 30 Stat. 364, while exercising a command in a camp of instruction in this country during the late war in Europe. P. 166. 57 Ct. Clms. 566, reversed.

APPEAL from from a judgment of the Court of Claims which sustained the claim of an army officer for increased pay and allowances.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellee.

Mr. Morrison Shafroth, by leave of Court, filed a brief as *amicus curiae*.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a suit by the plaintiff, a Lieutenant-Colonel of Field Artillery, National Army, in the service of the United States, to recover increased pay and allowances for exercising a command as Colonel of Field Artillery from August 27, 1917, to January 5, 1918. His action is

based on § 7 of the Act of Congress of April 26, 1898, c. 191, 30 Stat. 364, 365, as follows:

"That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised. . . ."

There is no dispute that the claimant is in every respect within the provision of this act except in the requirement that he was "serving with troops operating against an enemy." The Court of Claims held that this requirement was complied with, and gave judgment. 57 Ct. Clms. 566. The counsel for the Government oppose this view and seek by this appeal to reverse the judgment.

The claimant exercised his command as Colonel over the 315th Field Artillery, which was part of the 80th Division of the National Army. The division was organized and trained at Camp Lee, Virginia, and later on became a part of the American Expeditionary Force and engaged in action with the enemy.

During the whole period from August 22, 1917, to January 5, 1918, in which the claimant acted as Colonel, the regiment was stationed at Camp Lee, Petersburg, Virginia, and this camp was used as a camp of instruction.

Was this officer serving with troops operating against an enemy? The requirement is that the service shall not only be in time of war, but also with troops operating against the enemy. Troops in instruction camps across the ocean from the field of war can not in any proper sense be held to be operating against the enemy. Camp instruction is doubtless a necessary preliminary step to effective operation against the enemy, but it does not constitute such operation. This act was passed during the Spanish War and the Court of Claims rested its con-

clusion on the opinion of the Attorney General, 22 Ops. Atty. Gen. 95, in which he held that troops assembled in camps of instruction in the United States were to be considered as operating against an enemy under the statute. We think that the construction is so at variance with the ordinary meaning of the language that we can not follow it. It can hardly be said to have become the basis for a long executive construction and practice, because the Spanish War was soon over and the question of its application did not arise until the recent great war. We agree with the opinion of the Paymaster General in 1898 in this matter. He said:

"As yet, although war has been declared to exist between Spain and the United States, there are, in my opinion, with the exception of the troops embarked for the Philippine Islands, no troops 'operating against an enemy'. There is, within our borders, no enemy, within the meaning of the law, for troops to operate against. An army has been called together, and is being drilled, disciplined, and prepared to operate against an enemy, but until that army embarks for a foreign country, or until an enemy appears on our shores, and the army confronts it, it is held that no officer can receive the pay of a higher grade by virtue of anything in the act referred to."

The judgment of the Court of Claims is reversed.